**MUNAWAR AHMAD ANEES** A

**v.**

**PP**

FEDERAL COURT, PUTRAJAYA B
ARIFIN ZAKARIA CJ (MALAYA)
MOHD GHAZALI YUSOFF FCJ
RAUS SHARIF FCJ
[CRIMINAL APPLICATION NO: 07-4-2009 (W)]
28 DECEMBER 2009 C

***CRIMINAL PROCEDURE:*** *Jurisdiction of court - Federal Court - Inherent powers of court under r. 137 Rules of the Federal Court 1995 - Application to expunge certain paragraphs of court's judgment - Declaratory order that all comments in paragraphs obiter dicta - Principles to be applied - Courts of Judicature Act 1964, s. 87* D

***CRIMINAL PROCEDURE:*** *Revision - Court's inherent revisionary powers - Federal Court - Application to expunge certain paragraphs of court's judgment - Declaratory order that all comments in paragraphs obiter dicta - Principles to be applied - Rules of the Federal Court 1995, r. 137 - Courts of Judicature Act 1964, s. 87* E

***CRIMINAL PROCEDURE:*** *Judgment - Expunging of - Application to Federal Court to expunge certain paragraphs of its judgment - Declaratory order that all comments in paragraphs obiter dicta - Principles to be applied - Rules of the Federal Court 1995, r. 137 - Courts of Judicature Act 1964, s. 87* F

***CONSTITUTIONAL LAW:*** *Courts - Federal Court - Jurisdiction - Application to expunge certain paragraphs of court's judgment - Declaratory order that all comments in paragraphs obiter dicta - Principles to be applied - Rules of the Federal Court 1995, r. 137 - Courts of Judicature Act 1964, s. 87* G

This was the applicant's application moving this court to invoke its inherent powers under r. 137 of the Rules of the Federal Court 1995 ('RFC') to expunge paras. 20 to 26 of the judgment of this court in Criminal Application No. 07-4-2007(W) dated 17 December 2008 ('impugned judgment') or, in the alternative, to make a declaratory order that all the comments in the said paragraphs were *obiter dicta* and, hence, not binding. The applicant, charged in the Sessions Court for an offence under s. 377D of the Penal Code, pleaded guilty and was convicted and H I

A sentenced to six months' imprisonment. The applicant filed a notice of appeal in the High Court against the Sessions Court's decision. However, the applicant's repeated failure to appear personally before the High Court for hearing of the appeal resulted in the appeal being dismissed. The applicant then filed a notice of
B appeal to the Court of Appeal, which was dismissed by said court on 30 October 2007. Subsequently, the applicant applied to this court for a review of the Court of Appeal's decision under r. 137 of the RFC. On 17 December 2008, this court dismissed the application on the ground that it lacked the jurisdiction to hear the
C matter since said matter originated from a subordinate court. The applicant then filed a review application in the Court of Appeal for said court to review its decision of 30 October 2007, which application the Court of Appeal heard and dismissed. It was the appellant's contention that the ground of dismissal of the review
D application by the Court of Appeal was that the impugned judgment had made a determination on the merits of the case. Thus, the Court of Appeal, applying the doctrine of judicial precedent, had dismissed the applicant's review application. Hence, the present application.

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**Held (dismissing the application)**
**Per Raus Sharif FCJ delivering the judgment of the court:**

**(1)** It was not in dispute that the applicant's case originated from
F the Sessions Court and came before the High Court in its appellate capacity and not under its original jurisdiction. Section 87 of the Courts of Judicature Act 1964 provides that the Federal Court shall have jurisdiction to hear and determine any appeal from the decision of the Court of Appeal in its
G appellate jurisdiction in respect of any matter decided in the High Court in its original jurisdiction. In a criminal matter which originated from the Sessions Court, as in this case, the Court of Appeal stands as the apex court, and no further appeal shall lie to the Federal Court. The appeal should stop
H at the Court of Appeal, which was exactly what this court decided on 17 December 2008. This court had ruled that it could not deal with the matter for want of jurisdiction; surely, after declining jurisdiction, this court could not now assume it. The matter had come to an end. It had to stop otherwise
I there would be no end to a litigation. (para 16)

**(2)** In addition, what this court said in paras. 20 to 26 of the impugned judgment was not something plucked from thin air. From the impugned judgment, it was clear that what was said by this court in those paragraphs was in relation to something which was argued by the parties. Submissions on the merits of the case were made by the parties and, hence, there was nothing wrong for this court to express its view or opinion on the matter. Whether what was said by this court in paras. 20 to 26 was *obiter dicta* or a ruling, it was not for this court to determine through an application of this nature. There should not be a declaratory order to pinpoint which part of a judgment is *obiter* or a ruling. Such determination has to be done by the skills of counsel appearing before the courts. It cannot be done by way of an application as it was done in the present case. (para 17)

***Bahasa Malaysia*** *Translation Of Headnotes*

Ini adalah permohonan oleh pemohon meminta mahkamah ini untuk menggunakan kuasa-kuasa sedia adanya di bawah k. 137 Kaedah-kaedah Mahkamah Persekutuan 1995 ('KMP') untuk memadamkan perenggan-perenggan 20 hingga 26 penghakiman mahkamah ini dalam Permohonan Jenayah No. 07-4-2007(W) bertarikh 17 Disember 2008 ('penghakiman yang disoalkan') atau, sebagai alternatif, untuk membuat suatu perintah perisytiharan bahawa semua komen-komen dalam perenggan-perenggan tersebut merupakan *obiter dicta* dan, oleh itu, tidak mengikat. Pemohon, yang telah dituduh dalam Mahkamah Sesyen untuk sesuatu kesalahan di bawah s. 377D Kanun Keseksaan, memplid bersalah dan disabit dan dikenakan hukuman pemenjaraan selama enam bulan. Pemohon memfail satu notis rayuan dalam Mahkamah Tinggi terhadap keputusan Mahkamah Sesyen. Walau bagaimanapun, kegagalan berulang kali pemohon untuk hadir diri di hadapan Mahkamah Tinggi bagi pembicaraan rayuan itu mengakibatkan rayuan itu ditolak. Pemohon kemudiannya memfail suatu notis rayuan ke Mahkamah Rayuan, yang telah ditolak oleh mahkamah tersebut pada 30 Oktober 2007. Selepas itu, pemohon memohon ke mahkamah ini bagi penyemakan keputusan Mahkamah Rayuan di bawah k. 137 KMP. Pada 17 Disember 2008, mahkamah ini menolak permohonan itu atas alasan bahawa ia tidak mempunyai bidangkuasa untuk membicara perkara itu disebabkan perkara tersebut bermula dari mahkamah rendah. Pemohon kemudiannya memfail satu permohonan untuk penyemakan dalam Mahkamah Rayuan bagi mahkamah itu menyemak keputusannya yang bertarikh

30 Oktober 2007, di mana permohonan itu dibicara dan ditolak oleh Mahkamah Rayuan. Ia merupakan hujahan perayu bahawa alasan bagi penolakan permohonan untuk penyemakan oleh Mahkamah Rayuan ialah bahawa penghakiman yang disoalkan telah membuat sesuatu penentuan atas merit-merit kes. Oleh yang demikian, Mahkamah Rayuan, dengan menggunakan doktrin duluan penghakiman, telah menolak permohonan untuk penyemakan yang dibuat oleh pemohon. Oleh yang demikian, rayuan semasa.

**Diputuskan (menolak permohonan)**

**Oleh Raus Sharif HMP menyampaikan penghakiman mahkamah:**

**(1)** Ia tidak dipertikaikan bahawa kes pemohon bermula dari Mahkamah Sesyen dan dibawa ke hadapan Mahkamah Tinggi dalam keupayaan rayuannya dan bukan di bawah bidangkuasa asalnya. Seksyen 87 Akta Mahkamah Kehakiman 1964 memperuntukkan bahawa Mahkamah Persekutuan akan mempunyai bidangkuasa untuk membicara dan menentukan apa-apa rayuan dari keputusan Mahkamah Rayuan dalam keupayaan rayuannya berhubung dengan apa-apa perkara yang diputuskan dalam Mahkamah Tinggi dalam bidangkuasa asalnya. Dalam suatu perkara jenayah yang bermula dari Mahkamah Sesyen, seperti dalam kes semasa, Mahkamah Rayuan merupakan mahkamah tertinggi, dan tidak ada rayuan lanjutan ke Mahkamah Persekutuan. Rayuan itu mesti berakhir di Mahkamah Rayuan, yang merupakan apa yang mahkamah ini telah memutuskan pada 17 Disember 2008. Mahkamah ini telah memutuskan bahawa ia tidak boleh menyelesaikan perkara itu kerana ia tidak mempunyai bidangkuasa; semestinya, selepas menolak bidangkuasa, mahkamah ini kini tidak boleh menerimanya. Perkara itu telahpun berakhir. Ia mesti ditamatkan kalau tidak suatu litigasi langsung tidak akan mempunyai penamatan.

**(2)** Lagipun, apa yang dikatakan oleh mahkamah ini dalam perenggan-perenggan 20 hingga 26 penghakiman yang disoalkan bukan sesuatu yang direka. Daripada penghakiman yang disoalkan, ia adalah jelas bahawa apa yang dikatakan oleh mahkamah ini dalam perenggan-perenggan itu adalah berkaitan dengan sesuatu yang telah dipertikaikan oleh pihak-pihak. Hujahan-hujahan atas merit-merit kes telah dibuat oleh pihak-

pihak dan, oleh itu, tidak ada salahnya bagi mahkamah ini untuk menyatakan pandangan atau pendapatnya atas perkara itu. Sama ada apa yang telah dikatakan oleh mahkamah ini dalam perenggan-perenggan 20 hingga 26 merupakan *obiter dicta* atau satu keputusan, ia bukan untuk mahkamah ini untuk menentukan melalui suatu permohonan bersifat sebegini. Sepatutnya tidak ada perintah perisytiharan untuk menentukan bahagian mana satu penghakiman ialah *obiter* ataupun suatu keputusan. Penentuan sedemikian mesti dibuat oleh kemahiran peguam-peguam yang hadir di hadapan mahkamah. Ia tidak boleh dibuat melalui sesuatu permohonan seperti yang dibuat dalam kes semasa.

**Case(s) referred to:**

*Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor [2008] 5 CLJ 1 FC* ***(refd)***

*Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 CA* ***(refd)***

*Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC* ***(refd)***

*Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC* ***(refd)***

*Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC* ***(refd)***

*Chu Tak Fai v. PP [2006] 4 CLJ 931 FC* ***(refd)***

*MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC* ***(refd)***

*Ong Thye Peng v. Loo Choo Teng & Ors [2009] 4 CLJ 515 FC* ***(refd)***

*Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai & Others AIR [1941]*

*Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC* ***(refd)***

*Taylor & Anor v. Lawrence & Anor [2002] 2 All ER 353* ***(refd)***

**Legislation referred to:**

Courts of Judicature Act 1964, s. 87
Criminal Procedure Code, s. 313(2)
Penal Code, s. 377D
Rules of the Federal Court 1995, r. 137

*For the appellant - Manjeet Singh Dhillon (V Mugunthiaw with him); M/s Muhammad, Ganesan & Nazri*

*For the respondent - Awg Armadajaya Awg Mahmud DPP; AG's Chambers*

*[Editor's note: Please refer to Munawar Ahmad Anees v. PP [2009] 2 CLJ 42]*

*Reported by Suresh Nathan*

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## JUDGMENT

**Raus Sharif FCJ:**

**[1]** This is an application by the applicant moving this court to invoke its inherent powers under r. 137 Rules of the Federal Court 1995 ("RFC") to expunge paras 20 to 26 of the judgment of this court, in Criminal Application No. 07-4-2007 (W) dated 17 December 2008 ("impugned judgment") or in the alternative to make a declaratory order that all the comments in the said paragraphs as *obiter dicta* and hence not binding.

**[2]** We heard this application on 3 November 2009. Having heard the parties we adjourned the matter for our consideration and decision. We now give our decision and the reasons for the same.

**[3]** The events leading to this application are these. The applicant was charged at the Sessions Court for an offence under s. 377D of the Penal Code. On 19 September 1998, the applicant pleaded guilty to the charge. He was convicted and sentenced to six months imprisonment with effect from the date of arrest.

**[4]** On 29 September 1998, the applicant filed a notice of appeal in the High Court in Criminal Appeal No. 42-44-1998 against the decision of the Sessions Court. However, the appellant failed to appear personally in the High Court on several occasions, and the hearing of the appeal had to be repeatedly postponed. On 29 September 2003, the learned High Court Judge in exercising his powers under s. 313(2) of the Criminal Procedure Code ("CPC") dismissed the appeal on the basis of the absence of the applicant.

**[5]** On 11 September 2003, the applicant filed a notice of appeal to the Court of Appeal, Appeal No. W-09-31-2003 against the decision of the High Court. On 30 October 2007, the Court of Appeal dismissed the appeal.

**[6]** The applicant then made an application to this court in Criminal Application No. 07-4-2009(W) for a review of the decision of the Court of Appeal under r. 137 of the RFC. On 17 December 2008, this court dismissed the application. It was held that this court lacked the jurisdiction to hear the matter since the matter had originated from a Subordinate Court.

**[7]** The applicant thereafter filed a review application in the Court of Appeal for the Court of Appeal to review its decision of 30 October 2008. The application was heard and dismissed by the Court of Appeal on 12 August 2009.

**[8]** It is the contention of the applicant that the grounds of dismissal of the review application by the Court of Appeal were that the impugned judgment had made a determination on the merits of the case. Thus, the Court of Appeal applying the doctrine of judicial precedent dismissed the applicant's review application. It is for this reason the applicant is coming back to this court to have paras 20 to 26 of the impugned judgment to be expunged or in the alternative, to declare that all comments contained in paras 20 to 26 as *obiter dicta* and hence not binding.

**[9]** For ease of reference, we reproduced paras 20 to 26 of the impugned judgment which reads as follows:

> [20] Learned counsel for the applicant in his submission before this court had also argued at great length on the scope of s. 313(2) of the CPC and on the constitutional right of a litigant to a right of hearing. It was contended for the applicant that both the High Court and the Court of Appeal in the present case had erred in the failure to properly consider and apply s. 313(2) of CPC. Simply for this reason to ascertain whether in fact the High Court and the Court of Appeal had erred, we would take the liberty here to deal with this issue, notwithstanding that we had earlier ruled that this court does not have the jurisdiction to hear the plaintiff's application under r. 137 of RFC.
>
> [21] Section 313(2) CPC in so far as it applies to the instant matter provides:
>
> (1) ...
>
> (2) If the appellant does not appear to support his appeal the Court may consider his appeal and make such order thereon as it thinks fit:
>
> Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction ..., except on such terms as it thinks fit to impose.

[22] It is the submission of learned counsel for the applicant that even if the applicant as the appellant is absent, the court can consider an appeal and that to consider an appeal it must mean to consider it on its merits. It is the contention made on behalf of the applicant that the court has no power to arbitrarily dismiss an appeal without considering it on merits, but if the absent appellant is out of jurisdiction then the court can refuse to consider the appeal unless and until the absent appellant complies with such terms the court has seen fit to impose. Learned counsel for the applicant also submitted to us that the prayer of the applicant is not to set aside the conviction but to allow him the opportunity of having his appeal argued on its merits in the High Court.

[23] Again, we could not agree with the submission made on behalf of the applicant on the interpretation of the scope of s. 313(2) CPC and its application to the present case. We are of the view that the learned judge of the High Court had carefully considered the scope and application of s. 313(2) CPC in his well written judgment. The learned judge had stated in his judgment amongst others the reason why he had to dismiss the applicant's appeal without hearing its merits. The learned judge was of the view that since the applicant had failed to appear personally in court for his appeal to be heard on several occasions whereby the hearing of the appeal had to be repeatedly postponed, this would be a ground to justify the dismissal of the applicant's appeal. On this point the learned judge cited the case of *Hayati Aizan v. PP* [1999] 4 CLJ 697 in which his lordship Augustine Paul, J (as he then was) had this to say:

> In the appeal before me the appellant had failed to appear personally in Court on five occasions in pursuance of a condition upon which she was admitted to bail. It would be an abuse of the process of the Court to adjourn the hearing of the appeal any further. I was therefore of the view that the discretion must be exercised in favour of the application made by the prosecution to dismiss the appeal. Thus I dismissed the appeal."

[24] The learned judge of the High Court also discussed on what would be the resultant effect of the hearing of the applicant's appeal in his absence and the powers vested in the court at the hearing of an appeal. The learned judge took into consideration of the fact that the applicant is out of jurisdiction (for being outside the country) and the court having the revisionary powers on appeal to impose a heavier

sentence if the court finds the six (6) months imprisonment meted out on the applicant is manifestly inadequate even though the Public Prosecutor did not appeal against the sentence. It is for this reason that the learned judge concluded that it was incorrect for learned counsel for the applicant to contend that just because the applicant had gone through the trial process before the Sessions Court and had served his sentence that he did not have to appear. The learned judge anticipated the possibility of enhancing the sentence passed on the applicant but the powers to enhance the sentence cannot be carried out in the absence of the applicant as he has the right to be heard. To the court the presence of the applicant at the hearing of the appeal is of paramount importance, but for his repeated absence it would be justified for the court to exercise its discretion to dismiss the appeal without considering its merits.

[25] Finally, it is noted that in dismissing the appeal the learned judge of the High Court had given due consideration to the fact that the appeal by the applicant was in relation to the applicant's conviction and sentence upon his own plea of guilt under s. 305 of CPC. Under the said provision of s. 305 of CPC the applicant cannot appeal against the conviction except as to the extent or legality of the sentence. Having referred to the procedure and principles of law as laid down in the Supreme Court's case of *Lee Weng Tuck & Anor v. PP* [1989] 2 CLJ 120; [1989] 1 CLJ (Rep) 75 the learned judge found that the recording of the plea of guilt made by the applicant was in order and according to law. From the records of appeal available before him there was nothing to show that the proceedings before the Sessions Court where the applicant had pleaded guilty was conducted not in accordance with the procedure and principles laid down in *Lee Weng Tuck*'s case.

[26] For the reasons above stated we are in agreement with the conclusion arrived by the learned judge of the High Court that to allow the hearing of the appeal of the applicant in his absence would tantamount to an abuse of the process of the court. In the exercise of the discretionary power under s. 313(2) CPC the learned judge was therefore justified in refusing to consider the appeal and in dismissing the appeal.

**[10]** Mr. Manjeet Singh Dhillon, learned counsel for the applicant submitted that the above paras 20 to 26 ought to be expunged. He argued that once this court had ruled it was not seized of jurisdiction, it was thereafter coram non justice and precluded from

considering the merits of the matter. According to him, this court had thereafter neither the locus to rule nor comment on the merit of the case. By doing so, it had caused injustice to the applicant as the Court of Appeal in deciding the applicant's review application was referred to it and felt bound on what was said by this court.

**[11]** At the outset, we need to point out that what is before us is not an appeal but an application under r. 137 of the RHC. Rule 137 reads:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

**[12]** The principle governing the jurisdiction and exercise of the power to review under r. 137 of the RFC is well settled. (See *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1, *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565, *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931, *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1, *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201, *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833, *Ong Thye Peng v. Loo Choo Teng & Ors* [2009] 4 CLJ 515).

**[13]** It had been pointed out in those cases that r. 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of this court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 or other statutes. It merely restated that this court has the inherent jurisdiction to make any order to prevent injustice or abuse of power. And it had been accepted that in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision.

**[14]** In *Asean Security Paper Mills Sdn Bhd (supra)*, Abdul Hamid Mohamad CJ (as he then was), had listed the instances where the inherent jurisdiction of this court may be exercised. These are as follows:

(i) Where there is a lack of quarom as in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his function as a judge of that court;

(ii) Where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577;

(iii) Where there is a clear infringement of statutory law eg, where the court has mistakenly applied a repealed law. But where it is a matter of interpretation or application of the law, it is not a suitable case for review;

(iv) Where the application for review has not been heard by the court but, through no fault of the applicant, an order was inadvertently made as it has been heard as in *Raja Prithwi Chand Lal Choudhury v. Sukhraj Rai & Others* AIR [1941]; and

(v) Where bias has been established as in *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353.

**[15]** None of the above could fit into the facts of the present case. No doubt Abdul Hamid Mohamad CJ (as he then was) in the same case said that there may be other circumstances upon which the inherent powers could be exercised. But we do not see any circumstances in the present case which would allow us to do so.

**[16]** In the present case, it is not in dispute that the applicant's case originated from the Sessions Court. The matter came before the High Court in its appellate capacity and not under its original jurisdiction. Section 87 of the Courts of Judicature Act 1964 provides that the Federal Court shall have jurisdiction to hear and determine any appeal from the decision of the Court of Appeal in its appellate jurisdiction in respect of any matter decided in the High Court in its original jurisdiction. In a criminal matter which originated from the Sessions Court, as in this case, the Court of Appeal stands as the apex court. No further appeal shall lie to the Federal Court. The appeal should stop at the Court of Appeal. That was what exactly decided by this court on 17 December 2008. This court had ruled that it could not deal with the matter

for want of jurisdiction. Surely, after declining jurisdiction, this court cannot now assume jurisdiction. The matter has come to an end. It has to stop otherwise there will be no end to a litigation.

**[17]** In addition, we are of the view that what was said by this court in paras 20 to 26 of the impugned judgment were not something that this court plucked from thin air. From the impugned judgment itself, it is clear that what was said by this court in paras 20 to 26 was in relation to something which was argued by the parties. Submissions on the merits of the case were made by the parties. Hence, there is nothing wrong for this court to express its view or opinion on the matters submitted before the court. Whether what was said by this court in paras 20 to 26 is *obiter dicta* or a ruling, it is not for this court to determine through an application of this nature. As rightly pointed out by the learned Deputy Public Prosecutor, there should not be a declaratory order to pin point which part of a judgment is *obiter* or a ruling. Such determination has to be done by the skills of counsel appearing before the courts. It cannot be done by way of an application as it is being done in this case.

**[18]** For the above said reasons, the application must be dismissed.